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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 459

RALPH O. BROWNFIELD, *Petitioner*

v.

TRUMAN H. LANDON

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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Issues of Fact Raised by Petitioner

Respondent says, at page 10, "petitioner has not, and cannot, show the existence of any genuine issue of material fact to defeat the summary judgment in respondent's favor."

When the doctrine of *Barr* v. *Matteo*, 360 U.S. 564, is to be applied to any given case, the material fact will always be the scope of the official's duties vis'-à-vis' the person defamed. Attorney General Rogers recognized this in his memorandum to all heads of depart-

ments two weeks after this court announced the *Barr* decision. Petition, page 7-8.

In the instant case the scope of respondent's duties vis'-à-vis' petitioner was put in issue in two postures by the affidavits, depositions and exhibits on file:

1. On the date of the alleged slander did respondent have "control or supervision" over the investigation or the petitioner? (See discussion on page 9 of Petition).

2. Was it within the "outer perimeter" of respondent's line of duty on that date to:

a. Announce a judicial-type opinion as to petitioner's guilt or innocence?

b. Use words, when rendering his opinion, which are slanderous *per se?*

As to item 2, the question of whether an act is within the "outer perimeter" of a person's duties can often be resolved by reference to his "job sheet." In this case the pertinent Air Force Regulation (No. 20-68) was before the lower courts (J.A. 19-23). Neither respondent nor the lower court has indicated, as indeed they cannot, what part (or parts) of the cited regulation form the basis for a contention that the Inspector General could be considered as acting within the "outer perimeter" when he passed judgment in words which are slanderous *per se*. Reference to this line of argument, with citation to Regulation No. 20-68, was made in the Petition at page 8.

Issues of Fact Raised by Respondent

In addition to the issues of material fact already discussed, respondent apparently deems other issues as material.

1. Respondent refers to the "purpose of the conference" (pp. 7 and 10). Respondent's version of the "purpose" is contrary to petitioner's account as set forth in the Petition at page 3. If the "purpose" of that conference is material under the *Barr* doctrine, then there is another issue of material fact in the record.

2. Respondent refers to J.A. 17-18 and 45 and states (p. 5) that "at the request of the Congressman and McNett, General Eckert arranged a conference with respondent Landon." The first reference is to General Eckert's *affidavit*, but General Eckert later testified at his *deposition* that, "I do not recall whether I specifically proposed it or whether they specifically proposed it as a result of the conversation" (J.A. 72). The second reference is to Mr. McNett's deposition and is not supported by the text. In answer to the direct question "And you had requested it; is that right?", he said, "I don't know whether we requested it or he suggested it, but anyway I welcomed it" (J.A. 45). Congressman Wickersham testified at his deposition, "I don't recall myself asking for an appointment with Landon himself" (J.A. 59). If it is material under the *Barr* doctrine to know who originally had the idea for a conference with respondent, then there is another dispute as to a material fact.

3. Respondent refers (p. 5) to the affidavit of the Secretary of the Air Force (J.A. 13-14) in which the Secretary said that "Under the circumstances set forth in the affidavit of" respondent, "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham . . .". Respondent had said in his affidavit (J.A. 8) that Congressman Wickersham

and Mr. McNett "had demanded a meeting with me." Since this statement by respondent has been controverted by the three people who were together when the meeting was arranged, the affidavit of the Secretary (as to what respondent had to do "under the circumstances" described by respondent) has no probative value. If it is material under the *Barr* doctrine to determine whether, "under the circumstances", it was "incumbent upon" respondent to confer with Congressman Wickersham, there is yet another issue as to a material fact.

4. Respondent refers to Congressman Wickersham's affidavit (J.A. 26-28) and says that "Representative Wickersham opened the discussion by commenting on the investigation of Royal Electric Company and criticizing the attitudes and methods of the investigators" (p. 5). While it is true that the Congressman's affidavit supports this statement, yet when he was questioned later by the government's attorney during his deposition, Mr. Wickersham twice said that he opened the discussion by questioning the denial of the right of Royal Electric to bid on Air Force Contracts (J.A. 63, 66). At his deposition, Mr. McNett testified that the criticism of the attitudes and methods of the investigators came near the end of the interview (J.A. 46-47). If the opening statement in the discussion is material under the *Barr* doctrine, then there is still another issue of fact which must be resolved by a trial court.

CONCLUSION

There are now, and have been since the case was in the trial court, genuine issues as to material facts. Petitioner has consistently brought before the courts those issues which he deems material in view of the *Barr* v. *Matteo* doctrine. Respondent, in his brief, has made statements concerning the case which, obviously, he believes are material. As noted above, his statements are disputed.

Since there are genuine issues as to material facts, respondent's motion for summary judgment should have been denied (Rule 56(c), Fed. Rules of Civil Pro.; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627). This court should grant the writ of certiorari to correct what has turned out to be a misuse of the judicial process.

Respectfully submitted,

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November 5, 1962